Petition

81-1568

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JUDY LIEBERMAN,

Petitioner,

versus

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether damages are an available remedy under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*, to a person denied admission because of her sex to a medical school receiving federal financial assistance.

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Legislative History:

H. H. Rep. No. 94–1558, 94th Cong., 2d Sess. 7

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JUDY LIEBERMAN,

Petitioner,

versus

THE UNIVERSITY OF CHICAGO, the Division of Biological Sciences and The Pritzker School of Medicine, and JOSEPH CEITHAML, Dean of Students, and JOHN DOE and MARY ROE, The Committee of Medical Admissions of the University of Chicago, Division of Biological Sciences, and the Pritzker School of Medicine,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Judy Lieberman, through undersigned counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the District Court is unreported and is set forth in the appendix below, A. 1-5. The opinion of the Court of Appeals is reported at 660 F.2d 1195, and is set

forth at A. 6–24.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 23, 1981. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* was entered on November 23, 1981, A. 25. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Section 901(a) of the Education Amendments of 1972, 20 U.S.C. §1681(a), provides in relevant part:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

STATEMENT OF THE CASE

This petition arises from a suit filed by the plaintiff, Judy Lieberman, against the University of Chicago, its medical school (The Pritzker School of Medicine), the Dean of the medical school and its admission committee, in which she alleged that she was denied admission to the school because of her sex. Plaintiff stated a claim for relief [1] under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), and prayed for a declaratory judgment,

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1 Plaintiff originally stated an additional cause of action under 42 U.S.C. §1983, but voluntarily dismissed that claim.

injunctive relief and damages. In their answer, defendants admitted that the University of Chicago and the medical school programs to which Ms. Lieberman was denied admission received federal financial assistance, but denied discrimination against plaintiff. The basis for jurisdiction in the first instance was 28 U.S.C. §1343 and 28 U.S.C. §§ 2201–2202.

Judy Lieberman applied in 1976 for admission to the University of Chicago medical school's 1977 class. Her qualifications were extraordinary. [2] At the time of her application, Ms. Lieberman was 28 years old, married and living in a Chicago suburb with her husband, a teacher at Roosevelt University. She applied to a number of medical schools, but Chicago was her first choice because of its scientific orientation and because attandance there would not conflict with her husband's job.

Despite her qualifications which were clearly superior to at least some male applicants who were admitted to the medical school, Ms. Lieberman was "wait listed" at Chicago. During the application procedure, Ms. Lieberman was interviewed six times by the dean and other members of the medical school staff. The majority of those interviews concentrated on her relationship with her husband, plans for having children and other matters of an extremely personal nature. Ms. Lieberman was the only applicant subjected to

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2 She graduated *summa cum laude* from Radcliffe College (Harvard) in 1969 and received a Ph. D. in Physics from Rockefeller University in 1974. From 1974 to 1976 she was a member of the Institute for Advanced Study in Princeton, New Jersey, and in 1976 began work at the Fermi Laboratory in Batavia, Illinois, as a theoretical physicist. On the Medical College Admissions Test, administered nationwide to all medical school applicants, she scored in the ninety-ninth (99%) percentile.

six interviews and it is her claim that no male applicant was compelled to attend interviews focusing solely on his marriage and personal life.

After it became clear to Ms. Lieberman that she was not going to be admitted at Chicago, she accepted a place in the 1977 class at Harvard Medical School resulting in a ten month separation from her husband while he sought employment in the Boston area.

Ms. Lieberman filed this suit in August, 1979, seeking declaratory, injunctive and monetary relief. In May, 1980, defendants moved for summary judgment, and on September 23, 1980, the district court granted the motion and entered judgment for the defendants. The court below found that plaintiff's claim for injunctive relief was moot, because she was no longer interested in attending Chicago, [3] and concluded that, as a matter of law, Title IX does not create an implied right of action for damages. A panel of the Court of Appeals for the Seventh Circuit, with Judge Swygert dissenting, affirmed the district court. A timely petition for rehearing and rehearing *en banc* was denied, with three judges dissenting from the denial. A. 25.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR AUTHORITY OF THIS COURT

A. In *Cannon v. University of Chicago*, 441 U.S. 677 (1980), this Court held that there was an implied private right of action to enforce the provisions of Title IX des-

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3 At her April 12, 1980 deposition, Ms. Lieberman, who was by then in her third year at the Harvard Medical School, testified that she was not interested in changing schools.

pite the absence of an explicit provision for private suit in the statute. ***Cannon*** did not purport to limit the private right of action to any specific form of relief or to touch on the question of available remedies. See 411 U.S. at 724 n. 12 (White, J., dissenting). In this case, a majority of a panel of the Seventh Circuit found that ***Cannon*** merely authorized an "implied right of action for injunctive relief" (A. 11), and held that a plaintiff could not obtain monetary relief since Congress did not expressly provide for a damage remedy in Title IX. *Id.* The majority's requirement that Congress write in an express damages remedy for a private cause of action for which it did not expressly provide is, as noted by Judge Swygert in dissent, both "internally inconsistent as well as inconsistent with the Supreme Court's decision in ***Cannon.***" A. 15.

The majority rested its holding on this Court's opinion in ***Pennhurst State Hostital v. Halderman***, 101 S. Ct. 1531 (1081). ***Pennhurst*** dealt with the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 ***et seq.***, legislation designed to assist the States in creating programs for the care and treatment of the disabled by offering the States federal grants toward that end. The issue in ***Pennhurst*** was whether §6010 of the Act (the so-called "Bill of Rights" provision) imposed "conditions of receipt" on the participant states, thus creating enforceable rights and obligations. 101 S.Ct. at 1538. This Court concluded that the ambiguous language of §6010 did not speak so clearly that the participating States could be deemed to have foreseen or consented to having to bear the "hidden" costs of compliance with its provisions, which might include substantial expenditures by the States themselves, as a condition to the receipt of federal funds. *Id.* at 539–44. This Court found the language of §6010 was merely hortatory, not mandatory, thus conferring no substantive rights. In this case the court below concluded that implying a damage remedy under Title IX would impose a similar condition of receipt on

federal funds received by educational institutions which they could not have foreseen or contracted for. A. 10–12.

Reliance on *Pennhurst*, however, was misplaced. The federal-state grant program at issue there concerned a threshold question which this Court answered to the contrary in *Cannon*: whether the statute in question created substantive rights and obligations. *Cannon* held that Title IX did, and implied a private right of action to enforce them; *Pennhurst* held that §6010 did not, and thus did not reach the question of whether a private right of action existed. See 101 S.Ct. at 1545 n. 21. Whereas §6010 does not impose a condition of receipt on federal funds, Title IX, whose command is not merely hortatory, obviously does. *Pennhurst* itself makes clear that the issue of what substantive obligations or conditions Congress imposes on a recipient of federal funds is analytically distinct from and prior to the question of whether a private right of action exists to enforce those obligations. The question raised here, of whether a particular remedy is available to enforce acknowledged rights and obligations once a private right of action has *already* been implied, is subsequent still to either of those inquiries, and is a question with which *Pennhurst* was simply not concerned. See *Cannon*, *supra*, 441 U.S. at 724 n. 12 (White, J., dissenting); *Davis v. Passman*, 442 U.S. 288, 239–240 & n. 18 (1979).

The analogy to *Pennhurst's* hidden-cost reasoning, moreover, is inapt. The funds received by the participant States under the statute at issue therein were intended solely to assist them in providing advantages to the developmentally disabled. It was thought to be anomalous that the less than clear language of §6010 should be construed in such a way as not to "assist" the State in that goal, but to burden them, by requiring them to spend money as a condition to receiving it. Requiring compliance with §6010 would itself have imposed unavoidable, possibly destructive, costs. Such costs,

however, do not flow from compliance with Title IX, but only from non-compliance. See dissent at A. 14–15. By the simple expedient of non-discrimination, such costs will be avoided, not incurred.

Moreover, in *Cannon*, this Court explicitly noted that covered educational institutions would be required to bear the financial burden attendant upon individual enforcement litigation, including the potentially significant financial burden of attorneys' fees under the Civil Rights Attorneys' Fee Awards Act of 1976, 42 U.S.C. §1988, [4] none of which could have been foreseen or contracted for when the funds were first received. 441 U.S. at 709–710; *Id.* at 685–686 & n. 6 and 7. The lower court's suggestion, on analogy to *Pennhurst*, that, since the legislation providing federal funds for educational institutions was meant to assist them by easing their "financial distress", any imposition of a damages remedy would be contrary to that goal of assistance (A. 9), neglects the obvious fact that Congress expressed a clear desire in enacting Title IX *not* to assist institutions that discriminate.

B. In addition, by holding that damages were not available as a remedy unless explicitly provided for under a statute permitting a private right of action, the majority contravened the command of *Bell v. Hood*, 327 U.S. 678 (1946), and its progeny, that instructs federal courts in such circumstances to fashion relief by choosing among the range of traditionally available judicial remedies unless there exists an explicit Congressional declaration to delimit avail-

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4 42 U.S.C. §1988, in relevant part, provides for the recovery of attorneys' fees by the prevailing party "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of [Title 42], title IX of Public Law 92–318 . . . ." The House Report noted that, although sometimes only injunctive relief is sought under the statutes covered by the Act, "damages are theoretically available under [them]." H.R. Rep. No. 94–1558, 94th Cong., 2d Sess. 9.

able remedies. See dissent at A. 18–24.

> [W]hen federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Id. at 685. See also, *e. g.*, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 402 & n. 4 (1971) ("in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate congressional policy underpinning the substantive provisions of the statute") (Harlan, J., concurring in judgment); *Id.* at 395–397; *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239 (1969) ("the existence of a statutory right implies the existence of all necessary and appropriate remedies"); *J. I. Case Co. v. Borak*, 377 U.S. 426, 432–435 (1964); *Davis v. Passman*, 442 U.S. 228, 245 (1979); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 34 (1979) (White, J., dissenting).

The presumption that a federal court is authorized to select among traditionally available judicial remedies, whether or not explicitly provided for in the statute under which suit is properly brought, is not at odds with more recent decisions such as *Transamerica, supra.* There, this Court implied a private right of action under §215 of the Investment Advisors Act of 1940, 15 U.S.C. §80b–1 *et seq.*, but limited the available remedy to one of restitution and rescission, given the explicit statutory declaration in § 215 that contracts illegal under the Act "shall be void." 444 U.S. at 17–19. A private right of action and a claim

for damages under an antifraud provision of the Act, §206, was held unavailable since that section did not create any civil liabilities, 444 U.S at 19, and since Congress made alternative "express provisions for [its] enforc[ement]." *Id.* at 20. Where, as in *Transamerica*, the express preference for one remedy in a statutory scheme evinces an intent to exclude another remedy, the command of *Bell v. Hood* is inoperable by its own terms. See *Bivens*, *supra*, 403 U.S. at 396–97; *Davis v. Passman*, 442 U.S. 228, 247 (1979). ("were Congress to create equally effective alternative remedies, the need for damages relief might be obviated").

The present case "involves no special factors counselling hesitation [to implying a damages remedy] in the absence of affirmative action by Congress." *Bivens*, *supra*, 403 U.S. at 396. Nothing in the language of Title IX or in its legislative history or that of its model, Title VI of the Civil Rights Act of 1964, manifests a congressional intent to foreclose damages as a possible remedy. The only remedy to which Title IX alludes is that of administrative fund cutoff, a drastic remedy which this Court concluded in *Cannon* was not the sole remedial device for enforcing Title IX. 441 U.S. at 704–708. Unlike, for example, Title VII (or the statute at issue in *Transamerica*) there is no expressly created remedy of a limited nature that operates to exclude a compensatory remedy. "We have," therefore, "no explicit congressional declaration that persons injured by a . . . . violation . . . may not recover money damages . . . but must instead be remitted to another remedy, equally effective in the view of Congress." *Bivens*, *supra*, 403 U.S. at 396.

The fact that some members of Congress assumed that individual injunctive relief would be available to certain private litigants under Title VI (see *Cannon*, *supra*, 441 U.S. at 685 & n. 5), does not mean that injunctive relief was meant to be the exclusive remedy for private litigants under

Title IX. There is not one affirmative suggestion in these debates that damages would be an inappropriate mode of relief. [5] What is more, Congress rejected a proposal that would have given an express right to sue under Title VI but with a limitation to injunctive forms of relief. See *Cannon, supra*, 441 U.S. at 714–15 n. 50. The *Bell v. Hood* instruction that damages are presumptively available as a traditional judicial remedy is particularly appropriate here given the unique role of the federal courts in enforcing federal civil rights (see dissent at A. 23) and given the fact that legislative intent has frequently, as it did in Title IX, affirmatively taken the direction of delegating such remedial questions to the courts themselves. See *Cannon supra*, 441 U.S. at 717–18 (Rehnquist, J., concurring). Under these circumstances, it is clear, as this Court found in *Cannon*, that "Congress understood that it was conferring powers upon the courts to [grant relief] under the statute." *Id.* at 703 n. 34.

It is also clear that damages are necessary and appropriate to effectuate the policies underpinning the statute, and to make good the wrong done. The two objectives of Title IX are to end the use of federal funds to support sex discrimination and to provide individual citizens effective protection against those practices which violate the Act. *Cannon, supra*, 441 U.S. at 703–704. A damage remedy addresses both of those goals. Damages are an effective means

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5 This Court employs a similar analysis of legislative history in determining whether a private cause of action may be implied in a statute not expressly providing one: "[Where] federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such a cause of action would be controlling." *Cort v. Ash*, 422 U.S. 66, 82 (1975) (emphasis in original), quoted in *Cannon, supra*, 441 U.S. at 694.

to secure compliance with the statute and its anti-discrimination norm by deterring violations. *J. I. Case v. Borak, supra,* 377 U.S. at 432; *Carey v. Piphus,* 435 U.S. 247, 256-257 (1978). They would also serve the traditional purpose of compensation for the individual wrong. *Carey v. Piphus, supra,* 435 U.S. at 255 (1978); *Sullivan v. Little Hunting Park, supra.* In addition, injunctive relief may be less than "effective" in cases such as this. Highly qualified applicants are more likely to obtain admission at comparable institutions and forego injunctive relief. Those most able to prove intentional sex discrimination would then be in the least likely position to bring suit if only injunctive relief were available. For victims of sex discrimination in petitioner's position "it is damages or nothing." *Bivens, supra,* 403 U.S. at 310 (Harlan, J., concurring in judgment). See also dissenting opinion at A. 23–24.

II. THE OPINION BELOW IS IN CONFLICT WITH OTHER CIRCUIT AUTHORITY.

The majority's decision in this case is in implicit conflict with the decision of a panel of the Second Circuit in *Guardian's Ass'n of New York City v. Civil Service Comm'n,* 633 F.2d 232 (2d Cir. 1980), *cert. granted,* 50 U.S.L.W. 3528 (January 12, 1982). See generally Dissent at A. 12 n. 1. In *Guardian's Ass'n,* a majority of the panel ruled that damages were available as a remedy for violations of Title VI of the Civil Rights Act of 1964. Title IX, as noted in *Cannon,* "create[s] . . . . remedies comparable to those available under Title VI." 441 U.S. at 703. The Second Circuit, in reaching its decision that damages were available under Title VI, relied on this Court's opinion in *Cannon* which had implied a private right of action without limitation as to remedy under Title IX.

> [T]he Supreme Court in [*Cannon*] has examined Title VI without even hinting that

> private rights of action thereunder would depend for their existence on distinctions among the remedies sought. . . . The unmistakable import of the finding of a private right of action unlimited as to remedy under Title IX is that the same conclusion would be rendered if the issue of a private right under Title VI were presented. Significantly, the Court did not distinguish among the kinds of remedies sought or available under Title IX. . . .

Guardian's Ass'n, *supra*, 633 F.2d at 272 (Coffrin, J., concurring).

III. THE PETITION PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

The provision of effective remedies to victims of Title IX violations is an issue of exceptional importance.

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied.

Cannon, *supra*, 441 U.S. at 689 n. 10, quoting from *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 40 (1916). The failure of the court below to provide a damage remedy "only can be read as an evisceration of the ban against sex discrimination contained in Title IX." A. 12. (Swygert, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated February 19, 1982

Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 79 C 3533

JUDY LIEBERMAN,

Plaintiff,

VS.

THE UNIVERSITY OF CHICAGO,
The Division of Biological Sciences and
The Pritzker School of Medicine, and
JOSEPH CEITHAML, Dean of
Students, Biological Sciences and
JOHN DOE and MARY ROE,
The Committed on Medical Admissions
of the University of Chicago Division of
Biological Sciences and The Pritzker School
of Medicine, each individually and in
their official capacities,

Defendants.

MEMORANDUM OPINION AND ORDER

John Powers Crowley, District Judge

Judy Lieberman brought this action against the University of Chicago, the Dean of Students and members of the Committee on Medical Admissions, alleging violations of Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. §1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. Jurisdiction is invoked under 28 U.S.C. §1343, 28 U.S.C §2201 and 28 U.S.C. §2202. Plaintiff alleges that,

although highly qualified, she was denied admission to Pritzker School of Medicine (Pritzker) because of her sex. She seeks declaratory and injunctive relief and damages. After considerable discovery, Plaintiff moved to dismiss the Section 1983 claim. This motion was granted. Currently before the Court is defendants' motion for summary judment.1/

The background facts are undisputed. Lieberman holds several degrees and scholastic honors, including a Ph. D. in physics. She married in 1970, but due to career demands she and her husband have lived apart on several occasions. In 1976, when Lieberman sought admission to medical school, she and her husband were living in Oak Park, Illinois. Lieberman applied to numerous schools throughout the country. She was accepted at several, including Northwestern University and Rush-Presbyterian-St. Luke's in Chicago, and rejected by others, including the University of Chicago. She decided to attend Harvard Medical School, the school she considered the best of those which granted her admission, and has successfully completed three-fourths of her medical education. However, as a result of attending Harvard, Lieberman was separated from her husband for ten months before he could join her in Boston. Lieberman asserts that the University of Chicago, by denying her admission, forced her to attend an out-of-state school and thus, is liable for the damages sustained during the ten month separation from her husband. She seeks recovery of moving expenses, loss of consortium and mental suffering.

Defendants contend that there is no need to reach the merits of the allegations raised in the complaint because

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1/ Since the Section 1983 claim is no longer before the Court, it is unnecessary to consider defendants' allegation that subject matter jurisdiction is lacking.

plaintiff is not entitled to any of the relief requested. They argue that there is no private right of action for damages under Title IX. Further, they maintain that even if Title IX does permit damages, plaintiff is not entitled to recover expenses incurred solely by her voluntary decision to attend a medical school in another part of the country. Finally, they allege that plaintiff is not entitled to injunctive relief prohibiting defendants from continuing to deny her admission to Pritzker because she has conceded that she no longer has any interest in attending that school. Thus they claim that this issue is moot.

Assuming, *arguendo*, that Lieberman was excluded from participation in the medical education program because of her gender, and that Pritzker was receiving federal funds at the time of her exclusion, the issue is whether Title IX permits a private right of action for damages. Section 1681 of the Educational Amendments of 1972 provides that no person shall "on the basis of sex, be excluded from participation in, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681. Title IX provides for federal enforcement by terminating federal financial support, 20 U.S.C. §1682, but does not expressly authorize a private right of action. However, in interpreting Title IX, the Supreme Court has held that a private remedy is "fully consistent with . . . the orderly enforcement of the statute." *Cannon v. University of Chicago*, 441 U.S. 677 (1979). In reaching this conclusion, the Supreme Court noted that Title IX was designed to accomplish two goals: 1) to prevent federal funds from being sued to support discriminatory practices and 2) to provide individuals with effective protection against these practices. It reasoned the Congress must have contemplated a private right of action because a private remedy was essential if the individual was to be effectively protected.

Both plaintiff and defendants agree that *Cannon v. University of Chicago*, 441 U.S. 677 (1979) is controlling but differ as to their interpretation of the decision. Defendants read *Cannon* to permit a private right of action only for equitable injunctive relief. Plaintiff, on the other hand, argues that the relief available under Title IX is not limited because damage relief is essential for effective individual protection. Relying on *Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S. Ct. 242 (1979), plaintiff reasons that since Title IX is analogous to other civil rights statutes which provide for damages, damages are awardable under Title IX.

A careful reading of *Cannon v. University of Chicago*, 441 U.S. 677 (1979) convinces this Court that money damages are unavailable under Title IX. The *Cannon* Court, in finding both a private remedy and a public remedy under Title IX, stated that in a situation where an isolated violation has occurred, the violation might be remedied more effectively by an order requiring an institution to accept an applicant who has been improperly excluded than the termination of federal financial support. 441 U.S. at 704–705. There is no language in *Cannon*, however, which suggests that the individual relief envisioned includes damages.

Plaintiff states that *Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S. Ct. 242 (1979) supports its request for damages because there the court relied on the design of the statute, the legislative history and analogous statutes in deciding whether damages were available under the Investment Advisors Act of 1940. While plaintiff correctly states the manner in which the court reached the conclusion that damages are not available under this Act, it is difficult to understand how this supports plaintiff's contention that damages are available under Title IX. Not only did the *Transamerica* court find that damages were unavailable under the Investment Advisors Act, but it stated unequivocally that the fact that a limited private remedy may be implied

does not necessarily require the implication of damages. Moreover, although the extensive legislative history of Title IX contains language which indicates a Congressional intent to provide a private right of action, there is no mention of damage relief. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

The next consideration is plaintiff's request for injunctive relief. Plaintiff requests a permanent injunction prohibiting defendants "from continuing to fail and refuse to admit plaintiff to the University of Chicago Pritzker School of Medicine and requiring defendants to give plaintiff credit for any and all credits she has accrued at any other medical school." Yet, the evidence shows that plaintiff no longer has an interest in attending Pritzker. Plaintiff has never applied for a transfer, nor sought a hearing on the request for a preliminary injunction. Even more telling is her admission, at her deposition, that she does not wish to attend Pritzker at this time. Since the uncontradicted evidence establishes that plaintiff no longer has an interest in attending Pritzker, there is no need for injunctive or declaratory relief. *See Bordon, Inc. v. Butz*, 544 F.2d 312 (7th Cir. 1976).

Accordingly, defendant's motion for summary judgment with respect to the claim for damages under Title IX and the request for declaratory and injunctive relief is granted.

/s/ John Powers Crowley
John Powers Crowley
United States District Judge

DATED: September 23, 1980.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2549

JUDY LIEBERMAN,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-3533—John Powers Crowley, *Judge.*

ARGUED MAY 1, 1981—DECIDED SEPTEMBER 23, 1981

Before SWYGERT and PELL, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* Plaintiff, Judy Lieberman, filed this lawsuit against the University of Chicago, its medical school (The Pritzker School of Medicine), the Dean of Students of the Division of Biological Sciences, and the Medical School Admissions Committee, claiming that she was denied admission to the medical school as a result of sexual discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).[1] In her complaint, plaintiff

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

[1] The complaint originally included a claim under 42 U.S.C. § 1983, but that claim was subsequently dismissed on plaintiff's motion.

sought declaratory and injunctive relief as well as compensatory and punitive damages. Defendants' answer admits that the University of Chicago and its medical school receive federal financial assistance, but denies the allegations of discrimination.

Plaintiff had applied for admission to the 1977 entering class at the Pritzker School of Medicine. At that time she lived in Oak Park, Illinois with her husband and desired to remain in the Chicago area. Although placed on the "waiting list" at Pritzker, she was never offered admission and eventually accepted a place in the 1977 entering class at Harvard Medical School.[2] The plaintiff seeks compensatory damages for, *inter alia*, her moving expenses, pain and suffering, and loss of consortium.

The defendants moved for and obtained summary judgment. The District Court concluded that, based on the plaintiff's admitted intention to complete her medical education at Harvard, the request for injunctive relief was moot. The plaintiff does not attack that decision on appeal. However, the court also determined that the prayer for declaratory relief was moot, and that, as a matter of law, Title IX does not provide a damage remedy. The plaintiff appeals both of those decisions.

The issue of whether Title IX provides a damages remedy is conceded by the parties to be a question of first impression. The District Court based its decision on *Cannon v. University of Chicago*, 99 S.Ct. 1946 (1979), (hereafter *Cannon* I) and both sides argue that case as compelling support for their positions. In *Cannon* I, the court held that Title IX contains an implied private right of action for an individual injured by a violation of

[2] Plaintiff was offered admission to Harvard, the joint Harvard-MIT program, Albert Einstein, Northwestern University, Rush-Presbyterian-St. Luke's, and the University of Illinois. New York University, Cornell, and the University of Pennsylvania rejected her application. The University of Chicago and Yale placed her on the waiting list, although she eventually withdrew her application to Yale.

20 U.S.C. § 1681(a), and found injunctive relief appropriate. The question whether the plaintiff was entitled to damages was not addressed.[3] The Supreme Court has stated that:

> the question whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.[4] *Davis v. Passman*, 99 S.Ct. 2264, 2274 (1979).

Therefore, while *Cannon* I is certainly an important source of guidance for the issue before this court, we do not perceive it as dispositive of the question presented.

The exhaustive analysis of the legislative history of Title IX contained in *Cannon* I provides a foundation for our inquiry here. The legislation had two objects, to avoid the use of federal funds to support discrimination and to provide individual citizens effective protection against such practices, *Cannon* I, 99 S.Ct. at 1961. Title IX was intended by Congress to be interpreted and

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[3] The only mention of damages in *Cannon* I is a tangential reference in footnote 10, see footnote 7, *infra*.

[4] While the Supreme Court has made it clear that the issue of an implied remedy is distinct from the issue of an implied cause of action, guidance beyond that point is conflicting. It is agreed that the analysis required is one of statutory construction, however, there is authority that where a statute expressly provides a particular remedy it is improper to imply the existence of other remedies, *Transamerica Mortg. Advisors, Inc. v. Lewis*, 100 S. Ct. 242, 247 (1979) citing *inter alia*, *Botany Mills v. United States*, 278 U.S. 282, 289 (1929), *Securities Protection Investment Corp. v. Barbour*, 421 U.S. 412, 419 (1975); while on the other hand the Court has stated that "the existence of a statutory right implies the existence of all necessary and appropriate remedies," *Transamerica*, 100 S.Ct. at 252, (White, J., dissenting) quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). We believe that the result in the case *sub judice* is mandated by the analysis formulated in *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. 1531 (1981). Therefore, we do not deem it necessary to attempt a resolution of the apparent inconsistency.

applied as Title IV, upon which it was modeled,[5] *Cannon* I, 99 S.Ct. at 1957. Based on that premise this Court recently held, after a thorough analysis, that § 1691(a) only prohibits intentional discriminatory acts, *Cannon v. University of Chicago*, No. 80-1763 (7th Cir., May 6, 1981) (hereafter *Cannon* II).

Our analysis of Title IX proceeds with the observation that it was part of a bill designed to assist institutions of higher education adjust to a situation of "acute financial distress," 2 U.S. Code Cong. & Admin. News 1972, p. 2463. The legislation increased federal funding of higher education, both public and private, by expanding existing programs and initiating others, *Ibid.* Thus, Title IX, as an integral part of this legislative scheme,[6] must be deemed an exercise of Congress' Spending Power, that is, the imposition of the statutory prohibition is justified by the expenditure of federal funds, see *Cannon* I, 99 S.Ct. at 1963.

In *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. 1531 (1981), the Court provided guidelines for construing implied rights and remedies in the context of funding legislation:

> . . . . [L]egislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." [citations omitted] 101 S.Ct. at 1539.

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[5] The issue as to whether damages are available under Title VI is currently unresolved, see *Guardian Association v. Civil Service Commission*, 633 F.2d 232 (2nd Cir. 1980).

[6] The enactment of Title IX also amended certain provisions of The Civil Rights Act of 1964, 42 U.S.C. §§ 2000c and 2000h and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203 and 213, see, 1 U.S. Code Cong. & Admin. News 1972, p. 447. However, the plaintiff has not alleged a claim under any of those provisions. Therefore, we do not address them and our discussion of the Congressional intent and legislative history of Title IX is not intended to relate to those amendments.

In order to ensure a "meeting of the minds," the conditions to be imposed by Congress must be stated in unambiguous terms. For that reason, the Court in *Pennhurst* declined to impose certain obligations on the defendants (and create concomitant rights to enforcement for the plaintiffs) despite suggestive language in the legislation. The Court buttressed its decision by noting that it would be inconsistent with the legislative intent of assisting the defendants to fund certain programs to impose additional financial obligations on them.

Both Title IX and its legislative history are silent as to the existence of a damage remedy for sexual discrimination. However, appellant argues that it is a small step from the implied private cause of action created in *Cannon* I to an implied remedy in damages. But the decision in *Cannon* I did not significantly alter the conditions upon which the recipients accepted federal funds. The injunctive relief authorized in *Cannon* I merely permits the courts to require the institutions to comply with one of the unambiguous terms of the agreement. While the Court did expand the class of plaintiffs who could enforce the "contract," the remedy created did not impose any additional burdens on the recipients of the funds.[7]

However, the implication of a damages remedy would impose a potentially massive financial liability upon the

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[7] The Court in *Cannon* I did not refer to damages in a footnote quoting *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 40 (1916):

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law . . ."

However, the legislation involved in that case, The Federal Safety Appliance Acts, was enacted pursuant to the Commerce Clause and subject to different considerations regarding the implication of a damages remedy. Therefore, we do not consider our decision herein to be inconsistent with that holding.

institutions whose "acute financial distress" triggered the legislation.[8] Theoretically, this liability could exceed the amount of the federal funds received. In any event, this potential liability would be a significant factor which the recipients would need to consider before it could be said that they had exercised their choice "knowingly, cognizant of the consequences of their participation," *Pennhurst*, 101 S.Ct. at 1540. Therefore, as a matter of statutory construction, we must assume that if Congress had intended to create a remedy for damages it would have done so explicitly.[9]

Appellant argues that the implication of a damages remedy would create an extremely effective means of enforcing § 1681. However, as noted previously, we do not perceive that remedy as entirely consistent with the legislative purpose. Furthermore, in light of the implied private cause of action for injunctive relief authorized by *Cannon* I, coupled with the provision for an award of attorneys' fees contained in 42 U.S.C. § 1988, aggrieved individuals have at least one effective means of enforcement. 20 U.S.C. § 1682 also provides means for federal administrative enforcement. Therefore, based upon the considerations discussed above, we consider it unwise to imply an additional remedy. If a damages remedy is to be created, it should be fashioned by Congress and not by the Courts, thus providing the institutions with ample notice and an opportunity to reconsider their acceptance of federal aid.[10]

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[8] Appellant, who mitigated her damages to the extent that she accepted admission to another medical school of equal standing, seeks approximately $350,000.

[9] We decide this case solely as a matter of statutory construction and do not address the issue of the limitations on Congress' power to impose conditions on private parties or the States pursuant to the spending power, see *Pennhurst*, 100 S.Ct. at 1540, footnote 13.

[10] Because we conclude that a damages remedy is not presently available under Title IX, we need not address appellees' argument that appellant is not entitled to damages because of her failure to mitigate them.

As to the request for declaratory relief, we agree with the District Court that that issue is moot, see *Hansen v. Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975).

For the above-stated reasons, the judgment of the District Court is affirmed.

SWYGERT, *Senior Circuit Judge*, dissenting. I respectfully dissent from a decision which only can be read as an evisceration of the ban against sex discrimination contained in Title IX.[1]

I.

The analysis of the majority opinion rests on the Supreme Court's recent decision in *Pennhurst State School & Hospital v. Halderman*, ... U.S. ....., 101 S. Ct. 1531 (1981). Although *Pennhurst* is the linchpin of the

[1] A majority of a panel of the Second Circuit has ruled that an action for damages is available under Title VI. *Guardian's Ass'n of New York City v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980). In *Cannon* the Supreme Court indicated that "Congress intended to create Title IX remedies comparable to those available under Title VI." 441 U.S. at 703. Thus, from *Guardian's Ass'n* it follows that compensatory relief is available under Title IX. The view in *Guardian's Ass'n*, that compensatory relief is available under Title VI, was set forth in the opinion of Coffrin, J. (sitting by designation) (concurring). 633 F.2d at 272. Although Judge Coffrin's opinion is a concurring opinion, it was joined by Judge Kelleher (sitting by designation). The third member of the panel, Judge Meskill, concluded that no private right of action for compensatory relief existed under Title VI. The other two members of the panel concluded that while compensatory relief was available under Title VI, the absence of discriminatory intent precluded relief under Title VI. While the opinion of the two panel members may be considered dictum, there is authority in this circuit that it is not. *Alloy Int'l Co. v. Hoover-NSK Bearing Co., Inc.*, 635 F.2d 1222 (7th Cir. 1980) (not dictum if decision on issue reflects process of adjudication).

majority's reasoning, the majority opinion fails to provide a description of the facts and issues in *Pennhurst*.

Pennhurst concerned the Developmentally Disabled Assistance and Bill of Rights Act (Act), 42 U.S.C. § 6000 *et seq.* The Act creates a federal-state grant program through which the federal government provides funding to states that choose to participate. The funding is to aid participating states in designing programs for the care and treatment of the developmentally disabled. As is true with such federal grant programs, states that choose to accept the federal funds must comply with the conditions of the Act.

At issue in *Pennhurst* was section 6010 of the Act, the "bill of rights" provision. Section 6010 provides for a right to treatment which is to maximize the developmental potential of the individual and is to be provided in the setting least restrictive of the individual's liberty. In contrast to other sections of the Act, section 6010 does not specifically state that compliance with the provisions of that section is a condition for receipt of funding.

The court of appeals held that the provisions in section 6010 were conditions of receipt and that plaintiffs had standing to bring a private cause of action for the state's failure to comply with that section. The Supreme Court reversed, holding simply that section 6010 was not a condition of receipt of federal funding. The Court remanded for a determination of whether plaintiffs had an implied private cause of action under other provisions of the Act.

II.

While the majority accurately characterizes the Court's reasoning in *Pennhurst*, it provides no analysis as to why the reasoning of *Pennhurst* must apply. The only clue we receive is that both Title IX and the Act in *Pennhurst* were passed pursuant to the spending power. This superficial similarity does exist. Yet the present case involves issues vastly different from those in *Pennhurst*.

The majority relies on the following language from *Pennhurst*:

> . . . [L]egislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."

101 S. Ct. at 1539.

A careful reading of this passage in *Pennhurst* reveals that it simply is inapplicable to the present case. The Court in *Pennhurst* was not faced with implying a damage remedy nor even with implying a private cause of action. Rather, the Court had to decide whether the provisions contained in section 6010 were even a condition of receipt of federal funding. The Court made clear only the obvious—that in deciding whether to accept federal funding the state must be aware of its statutory obligations. A condition of receipt of funding must be made explicit. This has absolutely no bearing on the existence of a damage remedy or a private cause of action.

Indeed, the Court in *Pennhurst* explicitly stated the issue as

> [W]hether Congress in § 6010 imposed an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys under the Act or whether it spoke merely in precatory terms.

101 S. Ct. at 1540.[2] Also, the Court was careful to distinguish the possibility that an implied private cause of action may exist under other provisions of the Act. This issue was remanded to the court of appeals. 101 S. Ct. at 1545-46. *Cf. id.* at 1545 n.21 ("Because we conclude that § 6010 confers no substantive rights we need not reach the question whether there is a private cause of action under 42 U.S.C. § 1983 to enforce those rights."). *Pennhurst* concerned what obligations were

[2] *See also* 101 S. Ct. at 1538 ("Did Congress intend in § 6010 to create enforceable rights and obligations?").

imposed upon recipients of funds, not what consequences flow from a violation of statutory conditions. In the present case it is not disputed that Title IX is a condition of a receipt of federal funding. Thus, the analysis in *Pennhurst* is simply irrelevant.

The majority's reasoning appears even weaker when analyzed in light of the Supreme Court's decision in *Cannon* which implied a private cause of action under Title IX. The majority reasons that Congress must explicitly provide for a damage remedy because it is a condition of the "contract" between the federal government and the receiving institution. This overlooks the obvious fact that the Supreme Court in *Cannon* determined that an *implied* private cause of action exists under Title IX. Thus, the majority concludes that Congress can, by implication, create a private cause of action on behalf of an individual, but that it must expressly provide for a damage remedy. Even if I were to accept the logic of such a proposition, it appears that the existence of the implied cause of action is the more important policy decision which Congress would have to make regarding the passage of a statute. Therefore, it seems somewhat curious to conclude that Congress need not be explicit in creating standing for a violation of a statute, but must explicitly provide for a damage remedy.

Also, the logic of the majority is hardly flawless. The majority reasons that Congress must expressly provide for a damage remedy. This cannot possibly be reconciled with the Supreme Court's determination in *Cannon* that Congress implicitly created a private cause of action. The majority would apparently have asked Congress to write in an express damage remedy for a private cause of action for which it did not expressly provide. Obviously, if the damage remedy is to be expressly provided, there must be an express provision for a private cause of action. Thus, the majority's analysis is internally inconsistent as well as inconsistent with the Supreme Court's decision in *Cannon*.[3]

[3] Of course, the majority may be stating that a private cause of action may be implied by Congress but that a damage

(Footnote continued on following page)

The only attempt that the majority makes to reconcile the *Cannon* decision with its reasoning is to state that *Cannon* did not alter the conditions upon which a recipient accepted federal funds. The injunctive relief merely permits courts to require that receiving institutions comply with the conditions of the agreement. This attempt to minimize the impact of the holding in *Cannon*, that a private cause of action exists, is patently unpersuasive. Prior to the Supreme Court's decision in *Cannon* it was not certain whether a receiving institution would have to defend actions brought by individuals under Title IX. This was not made clear until the *Cannon* decision. The majority downplays the effect of

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[3] *continued*
remedy must be expressly created. Such a contention is without merit. The cases which have held that a *damage* remedy exists for an implied private cause of action are legion. *See, e.g., Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) (damages available for implied private right of action under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 388 (1970) (damages available in private right of action under § 14(a) of the Securities and Exchange Act of 1934 and Rule 14a-9). Although the majority makes no attempt to distinguish or discuss those cases the majority's analysis does not appear to be that Congress must always expressly provide for a damage remedy but only must so provide when a statute is passed under the spending power. Unfortunately, the majority does not state this as a guiding principle. Even if it were stated, however, it is a conclusion reached without reconciliation with the Supreme Court's opinion in *Cannon*. The majority attempts to distinguish *Cannon* on the basis that the receiving institutions would be financially harmed by the award of damages—which would be inconsistent with the funding purpose of Title IX. As noted above, the majority completely ignores the real purposes of Title IX—avoiding use of federal resources to support discriminatory practices and providing individual citizens protection against those practices. *Cannon*, 441 U.S. at 704. Nor is the majority persuasive in attempting to distinguish *Cannon* on the basis that implying a private cause of action is not a financial burden on the receiving institution. *See* discussion *infra*.

this "surprise" condition by concluding that it does not alter the conditions of receipt because at most the injunctive relief will require that the receiving institution comply with the explicit conditions of Title IX. This ignores several practicalities. First, the holding in *Cannon* imposes the unexpected burden on the recipient of hiring legal counsel and defending an action in court. The Court in *Cannon* explicitly recognized this in rejecting respondent's contention that defending individual Title IX actions would be costly. 441 U.S. at 709. Second, it ignores the potential monetary liability that a recipient may incur as a result of having to pay attorney's fees to prevailing parties. *See* 42 U.S.C. § 1988. Finally, it ignores the costs of complying with injunctive relief obtained by an individual. In sum, the majority's attempt to conclude that *Cannon* imposed no added conditions on a receiving institution is without support. *Cannon* imposed potential financial costs on a receiving institution which were unanticipated or unknown at the time funding was accepted.

The Supreme Court's decisions in *Cannon* and *Pennhurst* indicate that in cases involving federal funding statutes, there are three analytically distinguishable issues. As *Pennhurst* makes clear, the first issue is what *substantive* conditions Congress intended to impose on a recipient of funding. Those conditions, *Pennhurst* concludes, must be explicitly stated by Congress. The majority constantly refers to the implication of a damage remedy as a condition of receipt of funding. This is inaccurate and manifests a misunderstanding of the structure of federal funding and the availablility of individual relief for violation of the statutes.

The second issue, whether an implied cause of action exists, is a separate inquiry. The Supreme Court made that clear in *Pennhurst* when it remanded to the court of appeals the issue of whether an implied right of action exists under other statutory provisions. Resolution of that issue requires an analysis of the four factors set out in *Cort v. Ash*, 422 U.S. 66 (1975); *Pennhurst*, 101 S. Ct. 1548, 1557 (White, J., dissenting).

Finally, after determining what are the conditions of receipt of federal funding and whether an implied cause

of action exists, the issue of available remedies must be decided. This issue, as is discussed below, is governed by *Bell v. Hood*, 327 U.S. 678, 685 (1946).

The majority confuses these three analytically distinguishable issues. For resolution of the issue of remedy, the majority reverts to the *Pennhurst* "contract" analysis, apparently untroubled that *Cannon* resolved the implied cause of action issue without relying on the significance of the spending power or conditions of receipt of federal funding in its analysis.

III.

A proper statement of the law is contained in the seminal decision of *Bell v. Hood*, 327 U.S. 678, 685 (1946).

> [W]hen federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

See also Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969). The majority's only discussion of this point is in a footnote where it observes that this line of authority is apparently inconsistent with the Supreme Court's recent decision in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). The majority concludes that there is no need to discuss *Bell v. Hood* or its progeny because it concludes that the analysis provided for in *Pennhurst* is the applicable approach. As discussed above, *Pennhurst* simply is inapplicable to determining the existence of a damage remedy. It is curious that the majority should embrace *Pennhurst*, while at the same time relegate over thirty years of well-established Supreme Court authority to a cursory discussion in a footnote. *Bell* and its progeny certainly provide the relevant analytical framework and cannot be brushed aside.

The principle of *Bell v. Hood* serves two very important purposes. First, and most significantly, it recognizes the unique role that federal courts play in enforcing federal rights[4]—whether those rights be generated by statute or by the Constitution. The majority opinion completely ignores this fundamental principle and, without explanation, concludes that *Pennhurst* supplants this established doctrine.

The principle of *Bell v. Hood* serves another purpose—it gives courts guidance in analyzing matters of remedies for violations of federal statutes. My concern with the majority opinion is that the analysis it utilizes is completely inapplicable to future cases. Courts in this circuit which must follow the opinion will be at a loss to understand the relationship between the majority opinion, *Cort v. Ash*, *Bell v. Hood*, and *Cannon*. By failing to reconcile its approach with these Supreme Court precedents, other courts will be forced to play a shell game in determining what mode of analysis governs the issue of remedy.

Of course, the need for some principled way of resolving future cases is of significance in every area of the law. It assumes even greater significance, however, when we are determining whether a damage remedy exists for an implied private cause of action. As *Cannon* makes clear, determination of whether a private cause of action exists is a matter of legislative intent. But as has been observed, this task of determining legislative intent more often takes the form of Congress delegating to the courts to decide whether an implied private cause of action exists. *Cannon*, 441 U.S. at 717-18 (Rehnquist, J., concurring). Quite candidly, the legislative intent analysis, as embodied in the four factors of *Cort v. Ash*, often provides little guidance for reaching certain results. The task of determining Congress' intent as to

[4] For a discussion of the historical dynamics which led to the restructuring of the relationship between the individual, the state government, and the national government and the role federal courts were to play in the structure, see H. Hyman, A More Perfect Union (1973).

whether a damage remedy is to be part of the statutory scheme is an even more delphic task. Indeed, the task of distinguishing Congress' intent which led the Supreme Court in *Cannon* to conclude that an implied private cause of action exists under Title IX, from Congress' intent which in this case leads the majority to conclude that Congress did not intend to provide a damage remedy for violations of Title IX can best be analogized to the medieval practice of counting angels on the head of a pin. I do not possess the confidence of the majority in drawing such fine distinctions in analyzing the legislative history of Title IX.

Therefore, the principle of *Bell v. Hood* alleviates the tensions inherent in this separation of powers problem. It correctly recognizes that federal courts have the role of providing broad and flexible remedies for violations of federal statutory and constitutional rights and presumes that absent convincing legislative intent to the contrary the power is plenary.[5]

Nor does the Supreme Court's recent decision in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) change this conclusion, the result in that case being based on the unique statutory scheme contained in the Investment Advisors Act. In *Transamerica* plaintiffs sued under two sections of the Investment Advisors Act. Section 206 of the Act made certain activities illegal. Section 215 of the Act provided that a contract which is made in violation of the Act is void. Plaintiffs claimed that an implied cause of action for damages existed under both sections 206 and 215. The Court rejected this argument and held that plaintiffs' exclusive remedy was provided by the explicit terms of section 215—the contract could be voided. No damage remedy was available. The Court reasoned that where a statute expressly provides for a particular remedy a court should not read other remedies into the statute.

[5] For a general discussion of the respective roles of the federal courts and Congress in defining the scope of federal remedies see Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 U.C.L.A. L. Rev. 1301 (1978).

The statutory scheme in *Transamerica* differs significantly from Title IX. The decision in *Transamerica* rested on the explicit creation of a statutory remedy in one section which precluded the implicit creation of a damage remedy. Needless to say, Title IX does not have a parallel explicit statutory remedy.[6] Therefore, the reasoning of *Transamerica* is inapplicable to resolving the damage issue in this case.

The majority resists resolution of what it terms the "apparent inconsistency" between *Transamerica* and the principle of *Bell v. Hood*. This inconsistency may be "apparent" but is not real. To be sure, the principle of *Bell v. Hood* is a presumption and is not an absolute rule. In certain instances Congress may wish to alter the available remedies and may so provide.[7] This is exactly what *Transamerica* recognizes—the unique statutory scheme evinced a congressional intent to preclude a damage remedy. But the principle of *Bell v. Hood* should at least shift the burden to the party opposing the remedy to prove, by convincing evidence, that Congress chose not to provide a damage remedy.

In the present case, such convincing evidence has not been presented. The majority's only evidence is that the purpose of Title IX is to fund educational institutions which were in "acute financial distress." The majority concludes that to provide a damage remedy would be inconsistent with the purpose of the statute. The majority attempts to analyze the issue in terms of the legislative purpose but completely ignores the real purposes of Title IX. As stated in *Cannon*:

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[6] Indeed, in *Cannon* the Supreme Court explicitly rejected the contention that the cut-off provision in Title IX was the exclusive remedy under the Act. *Cannon*, 441 U.S. at 704-05.

[7] Of course, Congress' restriction of the remedies available for constitutional or statutory violations cannot infringe on constitutional rights. *Cf. United States v. Klein*, 80 U.S. 128 (13 Wall.) (1872) (statute which attempts to bind Supreme Court to certain decision in a case invades judicial function).

> Title IX . . . sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.

441 U.S. at 704. Conspicuous by its absence is any mention in *Cannon* of the legislative "purpose" relied on by the majority. Rather, as is made clear in the quotation above, the concern over discrimination dominated as the congressional purpose behind Title IX.

The majority concludes that the burden of paying damages would be inconsistent with the funding provisions of Title IX. Yet this very same cost argument in opposition to an implied private cause of action was explicitly rejected in *Cannon*. In *Cannon* it was argued that defending individual actions would be a costly burden on receiving institutions. The Court, in rejecting this argument concluded:

> [Respondents] argue that this kind of litigation is burdensome and inevitably will have an adverse effect on the independence of members of university committees.
>
> This argument is not original to this litigation. It was forcefully advanced in both 1964 and 1972 by the congressional opponents of Title VI and Title IX, and squarely rejected by the congressional majorities that passed the two statutes. In short, respondents' principal contention is not a legal argument at all; it addresses a policy issue that Congress has already resolved.
>
> . . .
>
> [R]espondents have not come forward with any demonstration that Title VI litigation has been so *costly* or voluminous that either the academic community or the courts have been unduly burdened.

441 U.S. at 709 (emphasis added).

I, therefore, must disagree with both the result and reasoning of the majority. The result in the instant case can only be understood as a setback in Congress' attempt to ban sex discrimination. Yet more troubling than the result is the reasoning used by the majority. Its reliance on *Pennhurst* and requirement of an *explicit* creation of a damage remedy ignores the historical role that federal courts have played in enforcing federal rights since the post-Civil War era. This historical role is embodied in the principle of *Bell v. Hood*. The majority's unexplained retreat from this principle is disturbing.

Also, preclusion of a damage remedy will impair the enforcement of Title IX. In *Cannon*, the Supreme Court concluded that implication of a private right of action was "not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute." 441 U.S. at 705-06. The most highly qualified individuals who have been discriminated against will undoubtedly forego admission into the defendant-institution and accept admission at another school. Considering the delays inherent in litigation many cases will become moot. Therefore, these exceptionally qualified individuals will be unavailable to enforce Title IX through private litigation. Enforcement of Title IX through private litigation will then be left to those individuals who have not been accepted at the defendant-institution and have not attended another institution. In those cases the plaintiffs may have less outstanding qualifications, though still may be qualified. Thus, it may be more difficult for the plaintiff to prove that lack of qualifications is not in fact the actual reason for the rejection. Likewise, in rebutting plaintiff's evidence of discrimination, the defendant-institution would be able to cover up any discrimination by focusing on the lesser qualifications of the plaintiff. I would allow those who are best able to prove discrimination, i.e., the most highly qualified, to bring actions to enforce Title IX. Provision of a damage remedy will allow these actions to go forward.

Preclusion of a damage remedy, therefore, will impair the role that individual actions are to play in the enforcement of Title IX. Aside from this crippling of the enforcement of Title IX, however, I also believe that a wronged individual should not be left without a remedy.

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> . . .
>
> The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

Marbury v. Madison, 5 U.S. 137, 1 Cranch 87 (1803). I find nothing in the "peculiar character" of this case to support the conclusion that Congress chose to retreat from this principle in passage of Title IX.

I would reverse the judgment of the district court.

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APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 23, 1981.

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge *

JUDY LIEBERMAN,
Plaintiff-Appellant,

VS.

THE UNIVERSITY OF CHICAGO, et al.,
Defendants-Appellees.

No. 80-2549

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 79–C–3533
John Powers Crowley, Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, Judy Lieberman, a vote of the active members of the court was requested, and a majority of the active members of the court have voted to deny a rehearing *en banc.** A majority of the judges on the original panel have voted to deny the petition for rehearing.** Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Judges Wood and Cudahy would have reheard *en banc*.

** Judge Swygert would have reheard the case.

Opposition

Supreme Court, U.S.
FILED
MAR 24 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JUDY LIEBERMAN,

Petitioner,

vs.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Cannon* v. *University of Chicago*, 441 U.S. 667 (1979), the Court found implied legislative intent to create a private cause of action to enforce the prohibition against sex discrimination in any education program receiving federal financial assistance provided in Title IX of the Education Amendments of 1972. Is the remedy implied by Congress limited to equitable relief or does it also include monetary damages?

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STATUTE INVOLVED

The Petition does not include those sections of Title IX relating to federal administrative enforcement, termination of funding, and judicial review. The relevant sections are set forth in an appendix to this brief. These are 20 U.S.C. §§ 1681-83 (Sections 901-3, Title IX of the Education Amendments of 1972, Public Law 92-318, 86 Stat. 373-75).

STATEMENT OF THE CASE

Petitioner Judy Lieberman applied for admission to the 1977 entering classes at 11 medical schools. She was offered admission to six, including three in the Chicago area: Rush-Presbyterian-St. Luke's, Northwestern University, and University of Illinois. Her application was rejected by three: Cornell,

New York University, and The University of Pennsylvania. She was "wait-listed" at Yale and at respondents' Pritzker School of Medicine.[1]

Petitioner accepted an offer of admission to Harvard and has since graduated with an M.D. degree. She commenced this suit in 1979—two years after entering Harvard—seeking injunctive and declaratory relief and compensatory and punitive damages of $349,742. The basis of her claim was that she was denied admission to The University of Chicago because of her sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

Petitioner and her husband moved to Oak Park, Illinois, from Princeton, New Jersey, in August 1976 when she accepted a position at the Fermi National Accelerator Laboratory in Batavia, Illinois as a physicist. She applied for admission to The University of Chicago medical school the same month she started working at Fermi.

Petitioner's husband remained in the Chicago area for ten months after she moved to Brookline, Massachusetts, to attend Harvard. Her claimed damages are based on moving expenses to Massachusetts, telephone and commuting expense between Oak Park and Brookline, cost of room and board in Brookline, loss of consortium, pain and suffering and $100,000 in punitive damages.

The district court granted respondents' motion for summary judgment, holding that petitioner was not entitled to any of the requested relief. The injunction and declaration issues were moot since she was then well into the Harvard program and indicated no interest in transferring to The University of

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[1] There were 5836 applicants for 104 available places in the 1977 entering class at respondents' medical school; 1367 or 23% were women and 4469 or 77% were men. Admission was offered to 49 women (23%) and 166 men (77%). Comparable statistics for earlier years at respondents' medical school are of record in *Cannon* v. *University of Chicago*, 559 F.2d 1063, 1067 (7th Cir. 1977).

Chicago, and damages were not an available remedy under Title IX.[2]

Petitioner appealed the damages and declaration rulings. By decision of September 23, 1981, the Court of Appeals affirmed the district court's holding that the prayer for declaratory relief was moot and that Title IX does not provide a damage remedy.[3]

Petition for Rehearing and Suggestion for Rehearing En Banc was denied on November 23, 1981.

The petition for certiorari presents only the issue of whether damages are an appropriate remedy to be implied in Title IX.

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[2] Respondents had also requested summary judgment on the alternate ground that since petitioner had been offered admission to three medical schools in the Chicago area, she could have avoided any of her claimed damages by attending any one of these schools. In view of its disposition of the other grounds in the summary judgment motion, the court did not rule on the mitigation question.

[3] The court noted that because of this disposition it did not address the mitigation point. 660 F.2d 1185, 1188 n. 10; Pet. A-11.

ARGUMENT

Introduction

The controlling case is *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). *Cannon* held that a private right of action is implied in Title IX and an action by an individual alleging discrimination may be brought against an educational institution which receives federal financial assistance.

Petitioner contends the decision below—that the remedy available to a private litigant under Title IX does not include monetary damages—conflicts with *Cannon* and *Bell* v. *Hood*, 327 U.S. 678 (1946) and with *Guardians Association* v. *Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980) cert. granted 50 U.S.L.W. 3528 (Jan. 12, 1982).

We disagree. The decision below is fully consistent with if not compelled by *Cannon*. *Bell* v. *Hood* is not relevant. There is no conflict between the decision below and that of the Second Circuit in *Guardians*.

The underlying premise of petitioner's argument is that since *Cannon* found an implied private right of action under Title IX, all forms of relief—damages as well as equitable—are therefore available. This premise is wrong.

The Petition (and the dissenting opinion in the court below) contend that *Bell* v. *Hood*, 327 U.S. 678 (1946), is determinative. Each quotes the same excerpt from the opinion to the effect that "where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Pet. 8; Pet. A-18.

Reliance on *Bell* simply begs the question. If the statute here—Title IX—had provided for a "general right to sue" there would have been no need for the four years of litigation under *Cannon* to decide whether there was an implied cause of action.

The existence of an implied right of action—and even an express right—does not of itself mean that the remedy of damages is automatically available. As the Court stated in *Davis* v. *Passman*, 442 U.S. 228, 239 (1979):

> the question whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.

Despite the effort of the Petition to minimize the significance of *Transamerica Mortgage Advisors* v. *Lewis*, 444 U.S. 11 (1979) and *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981), the fact is each supports the principle that the existence of an implied cause of action does not necessarily mean that damages are an available remedy. In *Transamerica* the Court concluded that "Congress did not intend to authorize a cause of action for anything beyond limited equitable relief." 444 U.S. at 22. The teaching is that the finding of an implied cause of action is not enough; more is required to demonstrate an intent to provide damages.[4]

The point in *Pennhurst* is not that the majority found no creation of substantive obligations under the so-called "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act (Pet. 5-6), but that both the majority and dissenting opinions agreed that if there were a private action the remedy would be limited to allowing recipients to withdraw from the federally funded program or to order the

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[4] *See also, Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981) (private action for injunctive relief only under the Education for All Handicapped Children Act, 20 U.S.C. § 1415). *Concerned Tenants Ass'n* v. *Indian Trails Apartments*, 496 F.Supp. 522 (N.D. Ill. 1980) (no private right of action under Title VI for monetary damages); *Rendon* v. *Utah State Department of Employment Security Job Service*, 454 F.Supp. 534 (D.Utah 1978) (no general or punitive damages under Title VI); *Miener* v. *Missouri*, 498 F.Supp. 944 (E.D. Mo. 1980) (private action for injunctive relief only under § 504 of the Rehabilitation Act).

recipients "*prospectively* to perform their duties incident to the receipt of federal funds." 451 U.S. at 53-54. Emphasis added.[5]

"The key to the inquiry is the intent of the legislature." *Middlesex County Sewerage Authority* v. *National Sea Clammers Association,* 101 S.Ct. 2615, 2622 (1981). In *Cannon* the Court exhaustively inquired into the legislative intent in finding an implied cause of action. This analysis, we submit, leads to the conclusion that the Congressional intent was to imply a private action for prospective relief only and not for monetary damages.

The Cannon Decision

In *Cannon,* the University defendant argued that the administrative remedy of promoting voluntary compliance with the ultimate sanction of termination of federal funding provided in Title IX was the exclusive remedy. The district court and Court of Appeals agreed. 559 F.2d 1063 (7th Cir. 1977). Before this Court, the plaintiff and HEW[6] contended that this remedy was inadequate because it would not get the aggrieved individual into the federally funded program. The Solicitor General argued at one point in his brief to this Court that Justice White's analysis in Bakke[7] on the question of private right of action:

> ". . . ignores the personal relief that may be awarded in a private suit under Title VI or IX, without regard for whether the recipient of federal funds chooses to accept or reject such funds in the future. In this case, for example, if petitioner proves the sex discrimination she has alleged,

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[5] This statement is found in the minority opinion authored by Justice White. The majority opinion observed "we do not significantly differ with our Brother White on the remedy for failure to comply with federally imposed conditions." 451 U.S. at 30 n. 23.

[6] HEW was a party to the action and aligned itself with plaintiff in the Supreme Court, where it was represented by the Solicitor General.

[7] *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978).

the district court may order her admission to medical school, even if the University of Chicago and Northwestern University never accept another penny of federal aid."

In a footnote to this text, the point was made even more explicit. A circumstance was hypothesised in which there was a federally financed facility in use, but no current funding, and that the recipient then discriminated on the basis of sex or race. "In this situation, an injunctive suit, either by the government or by the individual victims of discrimination, *would be the only means by which compliance could be enforced.*" Federal Respondents' Brief in *Cannon,* 77-926, at 55 n. 34. Emphasis added.

Applying the four-factor analysis enunciated in *Cort* v. *Ash,* 422 U.S. 66 (1975), the Court in *Cannon* extensively reviewed the legislative history of Title IX.

The majority opinion observed that Title IX was patterned after Title VI of the Civil Rights Act of 1964, and found that "the drafters of Title IX explicitly assumed that *it would be interpreted and applied as Title VI had been during the preceding eight years.*"[8] Emphasis added. Senator Bayh—who introduced and was the prime sponsor of Title IX—was quoted to the effect that the enforcement procedures would be the same under both statutes. 441 U.S. at 696, 697 n. 19.

The Court noted that in the years intervening between the adoption of Title VI and Title IX, at least a dozen federal courts had construed Title VI as creating a private remedy. "It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement,

[8] Title VI was adopted in 1964 and covered discrimination in federally funded programs based on race, color or national origin. Title IX was adopted in 1972 and simply substituted the word "sex" for the protected groups under Title VI. See 441 U.S. at 694-95.

we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX." 441 U.S. at 696-98. Emphasis added.

The fact is that in every Title VI case which the Court cited in support of its position, only equitable relief was afforded. *Not a single one provided damages as a remedy.*[9] Thus if Congress intended enforcement of Title IX to be the same as Title VI that enforcement could only be by way of equitable remedy.

The Court found further support for its conclusion as to Congressional intent from a bill that had been introduced by Senator Keating during deliberations on Title VI which included an express provision for a private right of action. The Court found that the failure of the administration to include that provision in the bill which became Title VI was not an indication of the rejection of a private right of action, but rather a compromise aimed at protecting individual rights without

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[9] In *Guardians Association* v. *Civil Service Commission,* 633 F.2d 232, 256 (2d Cir. 1980), Judge Meskill, concurring, confirmed this: "The parties have referred us to no case in which compensatory relief has been awarded under Title VI, nor has my own research disclosed any." In *Miener* v. *Missouri,* 498 F.Supp. 944, 948 (E.D. Mo. 1980), the Court granted a motion to dismiss a damage claim under a § 504 Rehabilitation Act action. "... [T]he legislative history shows an intent that the Section be enforced in the same manner as Title VI, and there is no authoritative decision allowing such damage suits under Title VI. Though there are passages in the legislative history referring to private enforcement suits, there is no such reference to damage suits, an incongruous circumstance if such suits were actually contemplated." In *Concerned Tenants Ass'n* v. *Indian Trail Apartments,* 496 F.Supp. 522, 527 (N.D. Ill. 1981), the court noted that *Cannon* had settled the issue whether a private right of action was available under Title VI. "The court does agree, however, that no private right of action exists under Title VI for *monetary damages.* There is simply no case law to support such a proposition, and Congress has not provided for such damages." (Court's emphasis.)

subjecting the Government to suit. 441 U.S. at 714-15. The Keating proposal for a private cause of action was limited to an action for "preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order." Senator Keating explained that this would allow private suits to terminate funding or to require "specific performance." Id. 715 n. 50.

This proposal and its analysis by the Court certainly is antithetical to any finding of Congressional intent to provide a remedy beyond equitable relief.

Another significant factor in the Court's decision was its examination of the purposes of Titles VI and IX. The Court found that the legislation sought to accomplish two objectives. "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." 441 U.S. at 704.

The first purpose is served, the opinion continues, by the statutory procedure for termination of federal funding.

> That remedy is, however, severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred. In that situation, the violation might be remedied more efficiently *by an order requiring an institution to accept an applicant who had been improperly excluded.* 441 U.S. at 704-5. Emphasis added.

If the remedy of termination of funding is "severe" and therefore suggests the alternate remedy of injunctive relief, as the Court found, then the remedy of damages may be even more "severe" and certainly cannot be implied from this analysis. The severity of a damage remedy has been commented on by other judges who have found that such a remedy cannot be implied.

In *Miener* v. *Missouri,* 498 F. Supp. 944, 948 (E.D. Mo. 1980), the Court concluded that the implication of a damage

remedy would be inconsistent with the legislative scheme of Title VI. "... [T]he fiscal effect upon the defendant in such suits might likely be the same as a cut-off of funds. A recipient of federal funds might well decide to forego such assistance when faced with the possibility of liabilities approaching or exceeding the funds received."

Judge Meskill of the Second Circuit observed, in a Title VI action, that "awards of compensatory and retrospective relief in such actions might have consequences far more crippling to the recipients of federal funds than termination. We regard it as highly improbable that Congress intended silently to arm private litigants with a weapon more devastating than that expressly created for the funding agencies themselves." *Guardians Association* v. *Civil Service Commission*, 633 F.2d 232, 262 n. 56 (2d Cir. 1980). Although Judge Meskill did not speak for a majority of the Court his reasoning is fully consistent with that of this Court in *Cannon* and *Pennhurst*.[10]

The short of it is that the rationale of the *Cannon* decision is bottomed on an assumption that only equitable relief is available as a remedy under the implied private right of action. That is the only private enforcement remedy that was extant under the prototype Title VI when Title IX was passed; that was all that Senator Keating—an ardent proponent of an express private right of action—proposed; that was the remedy the Court found appropriate to meet the second legislative purpose, the protection of individuals against discriminatory practices.

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[10] A critical step in the Court's analysis in *Pennhurst* was that it could not be assumed that Congress intended to impose "massive financial obligations" upon recipients of federal funds unless Congress did so "unambiguously." 451 U.S. at 17. The conclusion of the court below that the implication of a damage remedy under Title IX would impose a "potentially massive financial liability" upon educational institutions and that such a remedy can be imposed only if Congress explicitly so provided (Pet. A-10) is clearly consistent with *Pennhurst*.

We respectfully submit that the cause of action which this Court found in *Cannon* to be intended by Congress was an action only for equitable relief. There is no evidence whatsoever of a Congressional intent to imply an action for damages and Petitioner offers none; the legislative history relied on by the Court in *Cannon* is to the contrary.

No conflict among the Circuits.

Petitioner claims that the decision below is in "implicit" conflict with the decision of the Second Circuit in *Guardians Association of New York City* v. *Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980) cert. granted, No. 81-431, 50 U.S.L.W. 3528 (Jan. 12, 1982) (Pet. 11). *Guardians* was an action under Titles VI and VII of the Civil Rights Act of 1964 and § 1981 of the Civil Rights Act of 1866, challenging *inter alia* examinations given by the New York Police Department as racially discriminatory. With respect to the Title VI claim, the three judge panel concluded that plaintiff's claims for relief failed, Judges Coffrin and Kelleher (both sitting by designation) on the ground that plaintiffs had not shown the requisite purposeful discrimination under Title VI, and Judge Meskill, concurring in the result, on the ground that compensatory relief may not be granted under Title VI. Any discussion of remedy by Judges Coffrin and Kelleher was clearly dictum. The petition for certiorari did not present any question relating to remedy.

CONCLUSION

For the foregoing reasons, we respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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March 24, 1982

Appendix

APPENDIX

TITLE IX, EDUCATION AMENDMENTS OF 1972

20 U. S. C.—

§ 1681. Sex—Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

* * * * *

§ 1682. Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to

whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title.